IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

Crl.Rev.Pet.No. 4312 of 2006(D)

AGAINST THE ORDER DATED 02/09/2006 IN CMP.771/06, 772/06 IN CC.14/2006 of JUDL.MAGISTRATE OF FIRST CLASS, PAYYOLI

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REVN. PETITIONER: PETITIONER/RESPONDENT/COMPLAINANT

P.K.ABDULLA, S/O.MOIDEENKUTTY,
S/O.MOIDEENKUTTY, PURAKKOYILOTH HOUSE,
KOTTAPALLY AMSOM, KANNAMBATHKARA DESOM,
VADAKARA TALUK.

BY ADV. SRI.PULIKKOOL ABUBACKER
SRI.ZUBAIR PULIKKOOL
SRIM.JISHO JOHN

RESPONDENTS: PETITIONER/ACCUSED

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1. P.KUNHAMOOTY,
S/O.P.KUNHOOTTY HAJI,
AGED 48 YEARS, RESIDING AT RAYAROTH HOUSE,
THIRUVALLOOR AMSOM, DESOM,
VADAKARA TALUK.

2. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.N.L.KRISHNAMOORTHY
SRI.K.LAKSHMINARAYANAN
SMT.SATHYA SHREEPRIYA
PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 27/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P.No.4312 of 2006

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Dated this the 27th day of November, 2007

ORDER

In this revision filed under Sec.397 read with 401 Cr.P.C, the revision petitioner who is the complainant in C.C.No.14 of 2006 on the file of the Judicial First Class Magistrate's Court-Payyoli challenges Annexures VIII and IX orders dated 2.9.06 passed by the learned Magistrate in C.M.P.Nos.771 and 772 of 2006 in C.C.No.14/2006. As per Annexure-IX order the learned Magistrate allowed joint trial of five cases namely C.C.Nos.14,15,180,181 and 182 of 2006, all filed under Sections 138 read with 142 of the Negotiable Instruments Act, 1881. Joint trial was allowed on the ground that the dispute relating to issuance of 5 different cheques arises out of a single transaction and the complainant as well as the accused in all the five cases are the same. The learned Magistrate in this connection relied on the proviso to Section 218 as also Section 220 Cr.P.C., besides the decision reported in 2004(3)KLT 330.

2. I heard the learned counsel appearing for the revision petitioner as well as the learned counsel appearing for the 1st

respondent- complainant.

3. Assailing Annexures VIII and IX orders learned counsel appearing for the revision petitioner make the following submissions before me.

4. All the five cheques in question totaling a sum of Rs.15,05,047/- were issued by the 1st respondent as post-dated cheques. The dates of the cheques, the amounts covered by the cheques, the dates of presentation of those cheques, the dates of dishonouring of those cheques and the dates of filing the complaints in all the five cases were all different. Out of the five cases, three were initially filed before the Judicial First Class Magistrate's Court -Vadakara and they were subsequently transferred to Judicial First Class Magistrate's Court's - Payyoli, where the remaining two cases were pending. In those three cases filed before the Judicial First Class Magistrate's Court-Vadakara, the plea of the accused had been taken on three different dates. When these are the facts, Section 220 Cr.P.C cannot be invoked for ordering joint trial of the cases, since the series of acts cannot be said to be so connected together as to form the same transaction. Similarly, with the recording of the plea in three of the cases, the trial of those cases started. It

cannot therefore be said that the accused may be charged with and tried at one trial within the meaning of Sec.220 Cr.P.C. Invocation of section 218 Cr.P.C also cannot be supported since the request for joint trial should have been made before the commencement of the trial. Even in cases where single trial could have been ordered separate trial was held to be desirable in AIR 1956 S.C.407. In AIR 1954 Allahabad 501 also, the proposition laid down supports the contention of the revision petitioner. The learned Magistrate was thus wrong in allowing joint trial of the five cases. Annexure VIII order on C.M.P.No.771/2006 allowing the petition filed by the accused under Section 91 Cr.P.C for summoning of the two documents said to be in custody of the revision petitioner is also unsustainable, since the Apex Court has held in 2005(1)SCC 568 that the accused has no right at that stage to make such a prayer. The accused could have filed the petition under Section 91 Cr.P.C only at the stage of the defence evidence and not earlier. Hence the learned Magistrate was clearly in error in passing Annexure VIII and IX orders.

5. I am afraid that I cannot agree with the above submissions. Even according to the revision petitioner, a

partnership firm by name “Alrefa Jewellery” started in the year 2002, consisting of the revision petitioner and six others, as well as the 1st respondent/accused was ultimately dissolved. The 1st respondent- accused who was the Managing partner of the firm was found owing a sum of Rs.15,05,047/- to the revision petitioner. In discharge of the said liability towards the revision petitioner, the 1st respondent/accused issued the five cheques in question in favour of the revision petitioner. Even though, the cheques were bearing different dates and covering different amounts, they were all issued in discharge of a single liability for an amount of Rs.15,05,047/-. Hence the issuance of the five cheques can be said to be series of acts so connected together as to form the same transaction within the meaning of Section 220 Cr.P.C. The expression “same transaction” has been elucidated by the Apex Court in the decision reported in AIR 2001 SC 1490. This is what the Supreme Court has observed in the said decision.

> “It may be noticed that under Section 220 of the Code of Criminal Procedure, offences more than one committed by the same persons could be tried at one trial, if they can be held to be

in one series of acts, so as to form the same transaction. The expression"same transaction" from its very nature is incapable of an exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case, it can be held to be in one transaction. It is not possible to enunciate any comprehensive formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. But the circumstance of a given case indicating proximity of time, unity or proximity of place, continuity of action and community of purpose or design are the factors for deciding whether certain acts form parts of the same transaction or not. Therefore a series of acts whether are so connected together as to form the same transaction is purely a question of fact to be decided on the aforesaid criteria. Bearing in mind the aforesaid principles and on scrutiny of the narration of events in the FIR as well as the complaint, we do not find any infirmity with the conclusion of the High

> Court in applying Section 220 of the Criminal Procedure Code to the case in hand and in coming to the conclusion that the jurisdiction of the Magistrate at Bhagalpur cannot be held to have been ousted for the offence under Section 304-B IPC."

6. It is pertinent to refer to an important circumstance which preceded the application filed by the 1st respondent for joint trial. As mentioned earlier, three out of the five cases were initially filed before the Judicial First Class Magistrate's Court, Vadakara, whereas, two cases were instituted before the Judicial First Class Magistrate's Court- Payyoli. The 1st accused filed CMP No.57/06 before the Chief Judicial Magistrate, Kozhikode invoking the powers under Section 410 Cr.P.C and seeking transfer of the three cases from the Judicial First Class Magistrate Court - Vadakara to Judicial First Class Magistrate Court- Payyoli, specifically stating that the transfer was for the purpose of joint trail of the three cases along with the two cases pending before the Judicial First Class Magistrate Court, Payyoli. As per Annexure I order dated 22.6.06 the Chief Judicial Magistrate, Kozhikode allowed the application for transfer. That

is how all the five cases came before the Judicial First Class Magistrate Court- Payyoli. It was thereafter that the 1st respondent filed CMP No.772/2006 before the Judicial First Class Magistrate Court- Payyoli seeking joint trial of all the five cases together. If at all any person who would have been prejudiced by the joint trial was the accused himself. The proviso to Section 218 Cr.P.C clearly shows that if the accused person by an application in writing so desires and the learned Magistrate is of opinion that such person is not likely to be prejudiced thereby, the learned Magistrate may try together all or any number of charges framed against the accused persons. It is pertinent to note that the above said proviso is an exemption to the rule in Sec.218(1) Cr.P.C. which enjoins that for every distinct offence, there shall be a separate charge and every such charge shall be tried separately. After all, it was the accused who moved the learned Magistrate for joint trial and there is no question the accused being prejudiced thereby. It is true that in the decision reported in 2004(3) KLT 313 all the cheques were presented together and dishonoured together and only one complaint was filed. But then they were held to be one series of acts so connected together as to form the same transaction

within the meaning of Section 220 Cr.P.C and this Court approved the joint trial of those cases. I therefore do not find any infirmity in Annexure IX order for joint trial of all the five cases together. The same is accordingly affirmed.

7. Now coming to the legality and otherwise of Annexure VIII order passed on C.M.P.No.771/2006, I do not think that the decision reported in 2005(1) SCC 568 has any application to the case on hand. The Apex Court was considering the impropriety or permissibility of the accused in a Police charge case requesting the Court to look into the documents produced by the accused or to summon the documents at his instance so as to favour the accused with an order of discharge. The provisions which were considered by the Supreme Court were Sec.239 and 227 Cr.P.C. The Supreme Court held that, at that stage, the learned Magistrate or the Sessions Judge is obliged to look into only those documents which have been produced by the Police along with final report and that the accused cannot at that stage produce any documents or caused the production of any document for the purpose of claiming a discharge. The law laid down in the decision has no application in a case like the present one, where the procedure is that laid down for trial of summon

the case in a private complaint. Hence I do not find any impropriety in the 1st respondent filing CMP No.771/2006 before the Court below. But then the court below proceeded on the basis that the revision petitioner was in custody of those documents. If the revision petitioner is not in custody of the original of the documents sought to be summoned, it shall be open to the 1st respondent to lead secondary evidence with regard to the same without any demur from the revision petitioner. Hence Annexure VIII order passed by the learned Magistrate on the footing that the revision petitioner is in custody of all those documents may not strictly be justified. But since the learned counsel appearing for the 1st respondent submitted that he may be permitted to file a similar application when called upon to enter on his defence, I make it clear that not withstanding Annexure VIII order, revision petitioner will be entitled to file his objections to the petition, if any, filed by the 1st respondent.

This Crl.R.P. is disposed of as above.

V. RAMKUMAR, JUDGE

sj